STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

PLAINTIFF-APPELLANT,

v

JAMES RICHARD LARGE,

DEFENDANT-APPELLEE.

SUPREME COURT NO. 127142

COURT OF APPEALS NO. 253261

LOWER COURT NO. 03-000895-FH

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PLAINTIFF'S REPLY BRIEF

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATEMENT OF THE QUESTIONS PRESENTED

I.

WHERE DEFENDANT DROVE DRUNK AND KILLED A BICYCLIST, IS HE PROPERLY CHARGED WITH OUIL CAUSING DEATH, "BY THE OPERATION OF THAT MOTOR VEHICLE CAUSES THE DEATH OF ANOTHER PERSON"?

THE TRIAL COURT ANSWERED: NO

PLAINTIFF-APPELLANT ANSWERS: YES.

II.

WHERE DEFENDANT WAS DRUNK DRIVING AND SPEEDING, DID THE TRIAL COURT LEGALLY ERR IN FINDING AN ABUSE OF DISCRETION FOR BINDING OVER ON MANSLAUGHTER?

THE TRIAL COURT ANSWERED: NO

PLAINTIFF-APPELLANT ANSWERS: YES.

STATEMENT OF FACTS

MCR 7.212(D)(2)(b) (applied to this case through MCR 7.306(A)) specifically requires the appellee to point out "the inaccuracies and deficiencies in the appellant's statement of facts without repeating that statement." Since defendant has not pointed out a single inaccuracy or deficiency in plaintiff's Statement of Facts, plaintiff assumes that none exists and relies on it.

ARGUMENT

I.

A STATUTE THAT SAYS "BY THE OPERATION OF THAT MOTOR VEHICLE CAUSES THE DEATH OF ANOTHER PERSON" DOES NOT REQUIRE THAT THE INTOXICATION ITSELF CAUSE THE DEATH.

Plaintiff is filing this reply brief to make seven separate points. First, defendant's argument that the statute should be construed to require the intoxication to be the cause rather than the operation relies far more on policy grounds than it does on the actual statute itself. This statute, MCL 257.625(4), says:

> A person . . . who operates a motor vehicle in violation of subsection (1) or (3) and by the operation of that motor vehicle causes the death of another is guilty . . . .

As pointed out in the original brief, this statute does not say, as a number of other jurisdictions' statutes say, that the intoxication caused the death. Instead, it merely says "the operation of that motor vehicle causes the death." The person need merely be intoxicated while operating the vehicle.

Defendant does not even address the strongest argument for why this statute cannot possibly be read to require that the intoxication caused some type of change that caused the death. Subsection (1)(b) is the per se violation. It does not in the least require any effect on the driving at all. A subsection (1)(b) violation is, by the statute's own terms, a permissible alternative.[1] Therefore, the statute cannot possibly require that the

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[1]Contrast this statute to Canada's which specifically excludes the per se as an alternative. MCC 255.

intoxication caused a change which was the cause of death. Defendant does not even try to meet that particular argument.

In addition, defendant completely ignores plaintiff's and the Wayne County Prosecuting Attorney's comparing this statute to the DWLS causing death statute, MCL 257.904(4):

> A person who operates a motor vehicle [on a suspended license] and who, by operation of that motor vehicle, causes the death of another person is guilty. . . .

As the Wayne County Prosecuting Attorney points out, applying defendant's analysis to this statute "makes no sense." (P 26). In such a situation, "[t]he prosecution must show, for example, a "suspended license manner of driving" just as the prosecution must show an intoxicated manner of driving, "though in neither case is it required that the prosecution show that this manner of driving was negligent in any way."[2]

In addition, defendant does not address the Wayne County Prosecutor Attorney's point that defendant's argument is internally inconsistent. The following question sums it up: "What effect must the intoxication have had on the manner of driving, if not one that resulted in either gross negligence or ordinary negligence in the operation of the vehicle?" (Pp 10-11). In the end, defendant does not point to a single instance at

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[2]The facts in People v Brown, ___ Mich App ___; ___ NW2d ___ (docket no. 250016, released 01/27/05), exemplify this point. In Brown, the defendant pled guilty to driving on a suspended license causing death. A young boy chased a ball in front of him. The defendant was unable to stop on time. Although the defendant was speeding, no evidence could possibly have been presented showing that his driving on a suspended license somehow affected his driving manner which was the cause of the death. As such an interpretation "makes no sense," the parties did not even bother arguing it.

all where a person can possibly be guilty of this statute without also being at least negligent.

Instead, defendant uses policy considerations in asking this Court to affirm. Yet, when the language is clear, the reviewing court need go no further. Whitfield v United States, 543 US ___; 125 S Ct 687, 692; 160 L Ed 2d 611 (2005); Cowherd v Million, 380 F3d 909, 913 (CA 6, 2004). As pointed out inNiles Twp v Berrien Co Bd of Comm'rs, 261 Mich App 308, 313; 683 NW2d 148 (2004):

> It is a fundamental principle that a clear and a unambiguous statute leaves no room for judicial construction or interpretation [Gladych v New Family Homes, Inc, 468 Mich 594, 597; 664 NW2d 705 (2003)]; People v McIntire, 461 Mich 147, 152-153; 599 NW2d 102 (1999). "'When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case.'" Id. at 153, quoting People v McIntire, 232 Mich App 71, 119; 591 NW2d 231 (1998) (Young, PJ, concurring in part and dissenting in part) (emphasis in the original). Thus, this Court "may engage in judicial construction only if it determines that statutory language is ambiguous." Gilbert v Second Injury Fund, 463 Mich 866, 867 (2000).

Recently, in People v Mack, ___ Mich App ___; ___ NW2d ___ (docket no. 249023, released 2/8/05), p 4, the Court of Appeals made this point again (only clearer):

> We reject defendant's contention that construction of the plain language of MCL 771.14(e)(ii) and (iii) to apply the legislative intent expressed in the statute leads to an absurd and unjust result, the potential imposition of sentences of unlimited duration to defendants convicted as habitual fourth offenders. First, "[o]ur Supreme Court has since criticized and substantially limited, if not eviscerated, the "absurd result" rule, agreeing "with Justice Scalia's description of such attempts to divine unexpressed and nontextual legislative intent as 'nothing

> but an invitation to judicial lawmaking.'" McGhee v Helsel, 262 Mich App 221, 226; 686 NW2d 6 (2004), quoting People v McIntire, 461 Mich 147, 156 n 2; 599 NW2d 102 (1999). Further, in its many recent pronouncements on the subject of statutory interpretation, the Supreme Court has made it clear that "courts may not rewrite the plain language of the statute and substitute their own policy decisions for those already made by the Legislature." McGhee, supra at 226, citing DiBenedetto v West Shore Hosp, 461 Mich 394, 405; 605 NW2d 300 (2000).

Policy considerations, of course, are legislative, not judicial prerogatives.

Second, on page 17, defendant incorrectly states that plaintiff's position requires that "the causation element will always be satisfied." To the contrary, neither plaintiff nor the Wayne County Prosecuting Attorney accept such a position. Plaintiff's brief specifically stated:

> [A]s long as the operation is not causally de minimus and the death is sufficiently foreseeable from driving the car[, s]uch a defendant should not be held responsible for a death that results from someone else's grossly negligent or intentional act.
>
> * * *
>
> Defendant drunk driving does not mean that he is criminally responsible for every death in the world that occurs thereafter. (Pp 15, 16).

The Wayne County Prosecuting Attorney made the same point:

> Again, the measure of proximate or legal cause is reasonable foreseeability of the injury which occurred from the conduct of the accused. Certainly this excludes from criminal liability conduct which is a cause in fact, yet remote. For example, if an individual drives recklessly so as to endanger pedestrians, and his manner of driving catches the attention of a window-washer, who is so intrigued that he fails to pay heed to what he

> is doing, loses his balance, and falls, then the defendant's driving, though a but-for cause of the fall of the window-washer, is not the proximate or legal cause of his injuries. (P 18).

Third, defendant in no way shows that the statute is actually "ambiguous" as he claims. Merely, because the parties have argued the point hardly makes the statute ambiguous. If that were so, all statutes would necessarily be ambiguous as some parties always have a motive for arguing for an interpretation different from what the plain language says.[3] In fact, in pointing out that other States have litigated this issue, defendant misses one very important point. Virtually all of the cases ruled in plaintiff's favor. Of course, as pointed out in plaintiff's original brief, not a single one of these statutes is clearer on this point than Michigan's.

Fourth, defendant incorrectly states that the rule of lenity applies. Actually, in Michigan, it usually does not. MCL 750.2. Further, the rule of lenity applies only if the statute is ambiguous. United States v Boucha, 236 F3d 768, 774 (CA 6, 2001). As pointed out above, this statute is not ambiguous.

Fifth, defendant has somewhat shifted his position from the one that he took in his answer to the application for leave to appeal. In it, defendant somewhat argued that reinterpreting the statute would not help plaintiff's case. Now, however, he abandons any such argument entirely. His argument now rests exclusively on his claim that the statute

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[3]Of course, as always, any party can find support for any position. As a former Michigan Supreme Court Justice wrote in one of his fictional pieces, "there are few propositions of law, however weird, for which one can't find some legal authority somewhere . . . . If you can dream it, . . . some judge has held it." Traver, Laughing Whitefish (New York: Dell Publishing Co, Inc, 1965), p 225.

requires that the intoxication must have produced a change which was the cause. He does not in the least argue that plaintiff would still not have a case even if plaintiff's and the Wayne County Prosecuting Attorney's cause-in-fact analysis (with the foreseeability limitation) is applied.

Sixth, defendant's constitutional analysis does not in the least address plaintiff's point that this Court generally should not address an issue that was not even argued below. Defendant never argued to either the circuit court nor the Court of Appeals that plaintiff's interpretation would be unconstitutional.

Seventh, defendant has not shown that plaintiff's interpretation would be unconstitutional. In fact, he essentially admits as much. He argues nothing more than this Court should retain the present interpretation because, otherwise, constitutional problems might occur. He specifically admits that Armenia v Dugger, 867 F2d 1370, 1374 (CA 11, 1989), cert den 493 US 829; 110 S Ct 96; 107 L Ed 2d 60 (1989), directly rejected his argument. Instead, he points to certain dicta in Caivaiosai v Barrington, 643 F Supp 1007, 1011 (WD Wis 1986). Yet, he continues to ignore the following quote from that case: "Here, however, where the wrongful conduct consists of the combined acts of intoxication and driving, fundamental fairness does not compel the state to prove the causal relationship between the victim's death and each component of the defendant's act." Id.

As it is, in People v Cash, 419 Mich 230; 351 NW2d 822 (1984), this Court rejected defendant's due process argument. In Cash, this Court rejected interpreting the criminal sexual conduct statutes to allow for mistake of age. It then rejected the

defendant's claim that such an interpretation would be unconstitutional. 419 Mich 245-246. Of course, defendant's analysis would necessarily require this Court to essentially overrule Cash. Defendant's analysis restricts how the Legislature may interpret statutes. His claim that the Legislature may not criminalize unavoidable accidental situations applies just as well in Cash as it does in the present case. In the present, the defendant could have avoided the problem by not driving while drunk. In Cash, the defendant could have avoided the problem by not having sexual intercourse.

ARGUMENT

II.

BECAUSE DEFENDANT'S SPEEDING MAY HAVE CAUSED THE VICTIM'S DEATH, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN BINDING OVER ON INVOLUNTARY MANSLAUGHTER.

Plaintiff is writing this reply brief on this issue to make one point. Defendant completely misses plaintiff's point. Although the deputy testified that defendant could not have avoided the accident once Cody Otto drove in front of him, he did not say one word about defendant not being able to avoid the accident had he not been speeding for quite some time. Defendant driving just three minutes at sixty miles per hour equals one-fourth mile difference than if he had been driving merely fifty-five. The deputy said nothing to the contrary. Defendant driving drunk and speeding (for however long) is a jury question.

RELIEF

ACCORDINGLY, once again, plaintiff asks this Court to reverse and remand with instructions that the case be bound over for trial on both felony charges.

Respectfully submitted,

March 17, 2005

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Grounds of compassion, in this case the accused's desire to go to the hospital when he learned that his nephew who was at the hospital was in serious condition, do not constitute grounds for refusing to comply with the demand: *R. v. Heim* (1989), 98 N.S.R. (2d) 447, 13 M.V.R. (2d) 301 (C.A.).

A genuine religious belief is not an excuse for refusal to provide a breath sample: *R. v. Chomokowski* (1973), 11 C.C.C. (2d) 562, [1973] 5 W.W.R.184 (Man.C.A.).

The accused had a reasonable excuse for refusing to comply with the demand because of her concern about sanitation when the officer gave her an unwrapped mouthpiece: *R. v. Pittendreigh* (1994), 83 W.A.C. 169, 162 A.R. 169, 9 M.V.R. (3d) 236 (C.A.).

A reasonably held belief of a threat of unfairness or illegality by the police would support a reasonable excuse: *R. v. Dawson* (1996), 140 Nfld. & P.E.I.R. 176, 21 M.V.R. (3d) 299 (Nfld. C.A.).

Right to production – Failure to provide the accused with the mouthpiece he used in his attempt to blow into the breathalyzer did not violate the accused's rights under s. 7. It was highly improbable that a broken mouthpiece would not have been detected by even a brief inspection: *R. v. Mayer* (1989), 16 M.V.R. (2d) 174 (B.C. Co. Ct.).

Multiple convictions – The offences under this section and under s. 253(*a*) constitute separate and distinct acts or delicts and therefore the accused may be convicted of both offences though they arise out of one incident: *R. v. Schilbe* (1976), 30 C.C.C. (2d) 113 (Ont. C.A.).

PUNISHMENT / Impaired driving causing bodily harm / Impaired driving causing death / Previous convictions / Conditional discharge.

255. (1) Every one who commits an offence under section 253 or 254 is guilty of an indictable offence or an offence punishable on summary conviction and is liable,

(*a*) whether the offence is prosecuted by indictment or punishable on summary conviction, to the following minimum punishment, namely,

(i) for a first offence, to a fine of not less than six hundred dollars,

(ii) for a second offence, to imprisonment for not less than fourteen days, and

(iii) for each subsequent offence, to imprisonment for not less than ninety days;

(*b*) where the offence is prosecuted by indictment, to imprisonment for a term not exceeding five years; and

(*c*) where the offence is punishable on summary conviction, to imprisonment for a term not exceeding six months.

(2) Every one who commits an offence under paragraph 253(*a*) and thereby causes bodily harm to any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

(3) Every one who commits an offence under paragraph 253(a) and thereby causes the death of any other person is guilty of an indictable offence and liable to imprisonment for life.

(4) Where a person is convicted of an offence committed under paragraph 253(*a*) or (*b*) or subsection 254(5), that person shall, for the purposes of this Act, be deemed to be convicted for a second or subsequent offence, as the case may be, if the person has previously been convicted of

(*a*) an offence committed under any of those provisions;

(*b*) an offence under subsection (2) or (3); or

(*c*) an offence under section 250, 251, 252, 253, 259 or 260 or subsection 258(4) of this Act as this Act read immediately before the coming into force of this subsection.

(5) Notwithstanding subsection 730(1), a court may, instead of convicting a person of an offence committed under section 253, after hearing medical or other evidence, if